In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-258

RAY ELBERT PARKER, PETITIONER

v.

DANIEL J. BOORSTIN, LIBRARIAN OF CONGRESS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

Petitioner, a Library of Congress employee, brought four separate actions against Library of Congress officials, seeking money damages, declaratory and injunctive relief, including retroactive promotion, for alleged discriminatory employment practices in failing properly to train and promote him. On June 17, 1974, and October 16, 1974, the district court dismissed each of the complaints on the ground that petitioner had neither exhausted his administrative remedies nor established any "compelling reason why his failure to exhaust available administrative remedies should be

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excused" (Pet. App. 2b, 2c). The cases were consolidated for appeal, and on May 23, 1975, the court of appeals affirmed without opinion (Pet. App. A).

The record shows that petitioner neither followed applicable Library of Congress regulations governing complaints of employment discrimination (LCR 2020–1 to 2020–6), nor permitted the Library of Congress to reach a final determination on the merits of his claims, despite being advised of the procedure for doing so (Pet. App. 2c).[1]

Petitioner asserts that it would be futile to exhaust his administrative remedies (Pet. 8–9). He does not indicate, however, why exhaustion would be futile, nor has he shown that the agency is unable to afford him the relief he seeks. Accordingly, these suits were properly dismissed for failure to exhaust administrative remedies. *E.g., McKart* v. *United States,* 395 U.S. 185; *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41;[2] Rule 12(h)(3), Fed. R. Civ. P.

To the extent that petitioner has purported to raise claims cognizable under the Civil Rights Act, it is the

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[1] The "written statement" issued to petitioner by the Library of Congress on June 19, 1973, to which petitioner refers (Pet. 4), was not final agency action. It was, rather, notification that petitioner had failed timely to pursue administrative remedies with regard to a notice of intent to appeal certain job postings that he first filed on May 11, 1972.

[2] Petitioner contends that polygraph evidence is necessary "to prove which parties are 'willfully' and 'knowingly' giving false testimony regarding issue of jurisdiction and exhaustion of agency remedies" (Pet. App. 15d). There was ample evidence, however, upon which the district court based its finding that petitioner failed to exhaust administrative remedies. Petitioner's failure to exhaust was documented by the verified affidavit of Elizabeth W. Ridley, Employee Relations Officer of the Library of Congress (filed with the district court on August 28, 1974). Petitioner offered no evidence to rebut Mrs. Ridley's statements.

government's position that he nonetheless was required to exhaust. See our brief in *Brown* v. *General Services Administration,* No. 74–768. The Court may deem it appropriate, however, to hold the present petition pending its decision in *Brown.*

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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